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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING.

Petitioner respectfully presents this Petition for Rehearing based upon the following grounds:

1a. No member of the Court disagrees that, at a minimum, an adult has a fundamental personal right to read or view anything he chooses in his home. Nor does the Court contend that this right is unimpaired when a bookseller is punished for selling a book to an adult who requested the book and purchased it for his personal, private use. Nevertheless, the Court inexplicably rejects Petitioner's conclusion that such interference with a fundamental personal right cannot be upheld in the absence of evidence in the record of a subordinating state interest which is compelling. Instead, the Court permits the abridgment of a fundamental right upon nothing more than the "unprovable assumptions" (Slip Opinion, 5) that a book sold to

an adult may eventually fall into the hands of minors to there encourage or cause antisocial behavior.[1]

The Court's analysis in *Paris Adult Theatre I v. Slaton* of the state interests in "regulating the use of obscene material in local commerce and in all places of public accommodation" (Slip Opinion, 8) completely fails to answer the critical issues raised by Petitioner. The question is not whether there are any legitimate state interests in "regulating" obscenity, but rather whether any of these interests are sufficiently compelling to justify the infringement of an adult's fundamental right to read in private the book of his choice, and whether even compelling state interests could be satisfied as well by legislation narrowly restricted to the alleged evils. Indeed, even if the issue is perceived as one involving "conduct" embodying both speech and nonspeech elements, legislation restricting speech must be no broader than is essential to the furtherance of the state interests sought to be served by the legisla-

[1]It is remarkable that the Court supports the rationality of these "unprovable assumptions" by reference to the minority report of Father Hill and Reverend Link who dissented from the majority report of the Commission on Obscenity and Pornography (1970). The majority report, recommending the repeal of all federal and state legislation restricting the distribution of explicit sexual materials to adults, was concurred in by 12 members of the 18-man Commission. The majority commissioners included the dean of a major law school, the chief judge of a state juvenile court, the director of a major university library, two psychiatrists specializing in children and youth, and other social scientists. The only dissenters were Father Hill, head of a censorship group called "Morality in Media," Reverend Link, a Methodist minister, Charles H. Keating, Jr., leader of another censorship organization, "Citizens for Decent Literature," and a former state Attorney General. Thus, the only governmental agency to ever undertake an extensive and thorough review of obscenity laws, including a two-year program of empirical research, overwhelmingly rejected the "unprovable assumptions" which the Court now relies upon as the "rational" basis for impairing constitutional rights.

tion. See, *United States v. O'Brien*, 381 U.S. 367, 377. Thus, if a State is concerned that an adult who purchases a book for his own private enjoyment might later give the book to a minor, the constitutionally sound solution is to prohibit adults from selling or giving such books to minors, and not to reduce the adult population to reading only those books which are suitable for minors.[2] See, *Butler v. Michigan*, 352 U.S. 380.

In *Paris*, the Court also speaks of state interests in the "quality of life," the "total community environment," and the "tone of commerce in the great city centers." (Slip Opinion, 9). While the precise content of these asserted state interests is not entirely clear, if the concern underlying these phrases is with garish or vulgar stores or theatres, the concern can be properly met with appropriate regulation of public advertising, the appearance of public buildings, and zoning. But Petitioner is at a loss to understand how these state interests are compromised by permitting an adult to purchase the book of his choice. Surely the Court did not mean to suggest that state interests in the "quality of life," the "total community environmental," or the "tone of commerce" could serve to justify censorship of obnoxious political, economic or religious writings or philosophies.

With regard to the alleged "arguable correlation between obscene material and crime" (*Paris*, Slip Opinion, 9), aside from the extremely doubtful existence of any such correlation (See, Report of the Commission on Obscenity and Pornography, p. 52), a far

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[2]Indeed, California has enacted precisely such legislation. California Penal Code §313.1.

more persuasive correlation could be urged between writings which advocate the violent overthrow of the Government and action directed toward that end. Yet the Court has never doubted that such mere advocacy is anything less than fully protected from governmental suppression. The risk that books might encourage or cause antisocial behavior was well understood by the framers of our Constitution. But our founding fathers knew that governmental suppression of books is a far greater risk.

In short, once the Court recognized, as it did, that an adult has a fundamental personal right to read at home the book of his choice, the Court was required by long established constitutional doctrine to strike down any abridgment of that fundamental right unless the abridgment was necessary to serve a compelling state interest which could not be served by any less restrictive means. Instead, the Court analyzed the issue in terms of the "mere rationality" test ordinarily applied in the area of economic regulation not affecting fundamental rights. In doing so, Petitioner respectfully submits, the Court erred and a rehearing should be granted.

1b. For all of the reasons previously stated, the opinion of the Court is unsupportable even under the most narrow reading of *Stanley v. Georgia*, 394 U.S. 557. But Petitioner is firmly convinced that the Court has seriously erred in giving *Stanley* such a restrictive reading, both as a matter of constitutional law and public policy. To say that *Stanley* stands for nothing more than the proposition that "a man's home is his castle" (*Paris Adult Theatre*, Slip Opinion, 17) is patently untenable. There is nothing in the Court's decisions interpreting the Fourth Amendment's guarantee

against unreasonable searches and seizures to prohibit government officials from entering a man's home for the purpose of seizing his private collection of erotica, so long as the search and seizure is conducted pursuant to a validly issued search warrant or pursuant to a recognized exception to the requirement of obtaining a search warrant. The Fourth Amendment's protection of the sanctity of the home against unreasonable governmental intrusion says nothing about the validity or invalidity of state statutes prohibiting the mere private possession of obscenity. The privacy interest protected by the Court in *Stanley* was the privacy of mind and thought, the right of the individual to be free from governmental programs of thought control. In *Stanley*, the Court recognized that even the most "obscene" book or film may have genuinely serious value to the adult who desires to read or view it. To him, the book he wishes to read or the film he wants to see is neither "patently offensive" nor "prurient." To him it may provide a source of great emotional or intellectual satisfaction. It seems obvious that the protected interest in *Stanley* was not merely the home, but the communicative relationship between the medium of expression and the adult citizen desiring access to that medium of expression. Thus, just as "the constitutionally protected privacy of family, marriage, motherhood, procreation and child-rearing is not just concerned with a particular place, but with a protected intimate relationship" which "extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved" (*Paris Adult Theatre*, Slip Opinion, 17, n.13), so the protected privacy of an adult's right to the intellectual and emotional satisfaction to be gained from reading

or viewing the material of his choice must necessarily extend to the bookstore and the theatre in order to safeguard the protected right.

The Court does not advance clarity of analysis by comparing bookstores and theatres, limited to adults and inoffensive to the sensibilities of the general public, to "a man and woman locked in a sexual embrace at high noon in Times Square" (*Paris Adult Theatre*, Slip Opinion, 17-18). Similarly, the Court does not illuminate any constitutional principle by saying that rights of expression and privacy may be abridged by the use of such labels as "commercial exploitation" or "places of public accommodation." That a motel room is a "place of public accommodation" for purposes of civil rights statutes no more affords Government the right to prohibit an adult from reading any book of his choice in his motel room than it permits government agents from entering his motel room without a search warrant. Nor do we suppose that the privacy rights recognized in *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade* were in any way affected by the "public" nature of a birth control clinic or a hospital, or by the "commercial exploitation" of birth control devices and medical services.

Petitioner is similarly perplexed by the Court's wide-ranging analogies between governmental suppression of books and films and regulation of securities, trading stamps, natural resources, bear-baiting, and the like. Petitioner never argued, nor does he believe, that booksellers should be any more immune from consumer protection legislation than should any other businessman. There is no constitutional question of freedom of expression or right of privacy involved in a prosecution of booksellers for conspiring to fix prices, or

falsely advertising the works of Jacqueline Suzanne to be those of Shakespeare. But this Court has said time and again, and indeed has reiterated in *Roaden v. Kentucky* and *Heller v. New York*, that Government cannot treat allegedly obscene books and films the same way it can treat trading stamps or heroin. The latter may be seized, confiscated and destroyed without regard to such procedural safeguards as are required by cases like *Freedman v. Maryland*, 380 U.S. 51. But allegedly obscene books and films cannot be so treated precisely because it is their communicative content which is at issue rather than the manner of their commercial exploitation. Governmental regulation of the content of communication, as distinct from its time, place or manner, cannot be analogized to state regulation of commercial and business affairs without jeopardizing long estabished constitutional doctrines.

Rather than dealing in broad and inappropriate analogies, a rehearing is necessary so that the Court may focus its inquiry upon the questions actually presented by Petitioner: The substantiality of alleged state interests in interfering with the right of adults to read or view any material that they choose under circumstances where minors are not involved and the privacy and sensibilities of the general public are not intruded upon, and whether such state interests as might exist can be adequately served by means short of the wholesale prohibition and suppression of "obscene" matter.

2. In rejecting the necessity for determining whether alleged obscenity appeals to the "prurient interest" or is "patently offensive" according to the standards of the Nation as a whole, the Court has seriously undermined the guarantees of the First Amendment

and has added even greater uncertainty to an already vague area of law. The Court recognizes that "[u]nder a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community" (*Miller*, Slip Opinion, 15). For this reason, presumably, the Court holds that these First Amendment limitations will be protected by "the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary" (*Miller*, Slip Opinion, 10). Yet the Court does not state on what basis such independent review is to be carried out. Since *Roth*, the Court has frequently reversed state findings of obscenity as inconsistent with federal constitutional guarantees. The Court insists that it will continue this necessary protective function. Yet surely the Court has in the past and must continue in the future to exercise its power of judicial review in accordance with national standards, for the Court has neither the knowledge nor the jurisdiction to review the judgments of state courts by anything other than the standards established by the Federal Constitution. Indeed, one measure of the content of the national standards with respect to alleged obscenity is the decisions of the Court holding particular material to be protected by the Constitution. It seems anomalous for the Court to tell the fifty states that each may judge alleged obscenity by its own state standards, but at the same time to hold, as it must, that the states' determinations will be reviewed according to a national standard. When the Court reverses a state finding of obscenity, it is necessarily saying that the national Constitution forbids the suppression of that particular work anywhere in the Nation regardless of whether "[p]eople in different states vary in their tastes and

attitudes" (*Miller*, Slip Opinion, 19). By permitting the States, in the first instance, to judge alleged obscenity on the basis of their own standards is simply to encourage a proliferation of erroneous determinations by finders of fact which this Court will be obligated to correct. In the interim, however, constitutionally protected expression will be suppressed, perhaps for years.

In seeking to justify the use of such state standards, the Court points to alleged diversity in tastes and attitudes among the several States, and argues that "this diversity is not to be strangled by the absolutism of imposed uniformity" (*Miller*, Slip Opinion, 19). But the Court overlooks the fact that the truly significant diversity is not among the several States, but rather among individuals living side by side in every community in the land. With respect to whether a given work is perceived as being "patently offensive" or "prurient," individuals within any community will differ far more sharply than will the aggregate population in any one State as compared to any other. As Mr. Justice Harlan said in *Cohen v. California*, 403 U.S. 15, 25, "one man's vulgarity is another's lyric," and that mature observation far more aptly characterizes differences among particular individuals than among various polities.

Petitioner is no critic of diversity nor is he an advocate of "imposed uniformity." The national Constitution, after all, does not set the outer limits for freedom of expression in the several States. It does, however, set the outer limits for the suppression of freedom of expression. The national Constitution guarantees only the minimum content of freedom of expression, and no State has the power to reduce that mini-

mum content. Our Nation does enjoy a pluralistic society, but this laudable fact of diversity cannot rationally justify depriving the citizens of one State of expression which the Nation as a whole tolerates. Requiring judges and juries to apply national standards in this area cannot guarantee the absence of verdicts influenced by subjective personal prejudices or capriciousness. But insistence upon the use of national standards to judge alleged obscenity in any given community at least encourages recognition of the fact that the media of communication today are indeed national; the political, social, economic, and even sexual issues that confront us are, for the most part, national issues; and the use of national standards can at least minimize the risk that particular fact-finders will judge expression by subjective and parochial standards and, in so doing, deprive their own neighbors of freedom of choice.

No judge or jury can force another person to read a book or watch a film, they can only prevent another person from having the opportunity to do so. It is because judges and juries in obscenity cases have the power only to restrict access to expression, that their power must be circumscribed by minimum national standards of tolerance.

3. The Court held that there is no "constitutional need for 'expert' testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene materials themselves are placed in evidence." (Slip Opinion, 7). Petitioner respectfully submits that this holding is contrary to First and Fourteenth Amendment principles, and further compounds the vagueness inherent in the new, as in the old, definition of "obscenity."

The Court advances two reasons in support of its holding, neither of which can withstand critical analysis. First, the Court rejects the need for expert evidence that challenged material is obscene because the materials "are the best evidence of what they represent." (*Paris*, Slip Opinion, 7). While it is indisputably true that the best evidence of the content of a work is the work itself, this statement of a rule of evidence completely fails to meet the question presented. In prosecutions for disseminating alleged obscenity, the content of the challenged work is virtually never at issue. Rather, the issue in all such prosecutions is whether the material satisfies each of the independent elements which must exist before a work can be found obscene consistent with the Constitution. The Court's reformulation of those three elements in *Miller* still requires the prosecution to prove not merely the contents of the challenged work, but also "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (*Miller*, Slip Opinion, 9-10). By merely reciting the "best evidence rule," the Court avoids the real issue, which is whether the mere reading or viewing of a book or film can, standing alone, inform the trier of fact as to whether the material satisfies each of the three elements necessary to support a finding of obscenity. The naked assertion that "hard core pornography . . . can and does speak for itself" (*Paris*, Slip Opinion, 7, n. 6) hardly serves as

an adequate substitute for a reasoned analysis of the issue.

Secondly, the Court questions the appropriateness of the use of expert testimony by stating that "[s]uch testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand . . . No such assistance is needed by jurors in obscenity cases. . . ." (*Paris*, Slip Opinion, 7, n.6). The Court's position here is not only manifestly incorrect, but is contradictory to its statement in *Kaplan* that "[t]he defense should be free to introduce appropriate expert testimony, see Smith v. California, 361 U.S. 147, 164-165 (1959) (Frankfurter, J., concurring)" (Slip Opinion, 7). The fact is that lay jurors cannot, without expert assistance, determine whether any given work satisfies the standards for judging obscenity. It is unreasonable to assume that lay jurors are necessarily familiar with community standards of tolerance and whether material appeals to prurient interest when "judged by its impact on an average person." (*Miller*, Slip Opinion, 19). Application of these standards to particular works necessarily involves knowledge of the "social sciences which lay persons cannot be assumed to possess. Moreover, it is inherently contradictory to assert that jurors or judges can simply examine a book or film and, without more, determine that it lacks serious literary, artistic, political or scientific value. Without expert testimony, the standards for judging alleged obscenity become mere lingual abstractions, incapable of objective application. To permit the prosecution to discharge its burden of proof by nothing more than parading the material in front of a jury is to reduce obscenity trials to a sham.

When a book is placed in evidence, the only fact proven is the existence of the book. The conclusion that obscenity is not self-evident is established by the multitude of reversals by the Court of findings of obscenity made by judges, juries and appellate courts. Protection for nonobscene works can only be assured if the most sensitive tools are utilized to ascertain the dim and uncertain line between protected and unprotected speech. Expert testimony is one of the most important of these sensitive tools. Without it, judges and juries are left free to suppress speech and press based upon their own personal prejudices and subjective reactions, thereby reducing the rule of law to a matter of taste.

4. Finally, the Court denies First Amendment protection to the book involved in the present case describing it as, *inter alia*, " 'clinically' explicit and offensive to the point of being nauseous" (Slip Opinion, 2). One must wonder whether a book's capacity to induce nausea in at least five members of the Court is the true measure of its constitutional protection. Nowhere does the Court attempt to distinguish this book from the host of other, similar books which the Court had previously held to be protected from governmental suppression. The failure of the Court to provide a reasoned analysis of why this book, unlike so many others, falls outside the embrace of the First Amendment, strongly suggests that the Court's newly formulated standards for judging obscenity are no less vague than the old. To persons engaged in the circulation of the press, there is no real guidance in the Court's opinions. If the Court's new standards are indeed "more concrete than those in the past" (*Miller*, Slip Opinion, 5), if the Court is now to "abandon the casual practice of *Redrup v. New*

York . . . and attempt to provide positive guidance to the federal and state courts alike" (*Miller*, Slip Opinion, 14), then should the Court not feel constrained to carefully delineate the process of reasoning leading to a conclusion that a book is unprotected by the First Amendment? Because the Court has failed to do so in this case, Petitioner respectfully urges the Court to grant a rehearing.

Conclusion.

For all the foregoing reasons, the Petition for Rehearing should be granted and the judgment herein should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,
DAVID M. BROWN,
Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

Attorneys' Certificate of Good Faith.

The undersigned, STANLEY FLEISHMAN and DAVID M. BROWN, attorneys for Petitioner, hereby certify that the Petition for Rehearing filed in this cause is presented in good faith, that in their judgment the grounds of said Petition are well taken and in conformance with the Court's rules and that said Petition for Rehearing is not interposed for delay.

STANLEY FLEISHMAN
DAVID M. BROWN
Counsel for Petitioner.